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September 25, 2014

VIA EMAIL & REGULAR MAIL
Eric Schaaf, Esq.
Regional Counsel
U.S. Environmental Protection Agency, Region 2
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Dear Eric:

I write to apprise of conduct by the Regional Counsel's Office that does not reflect the usual professional standards that the environmental community has grown to expect from that office, conduct that prejudiced our clients and will complicate the Agency's efforts to achieve a resolution of the New Cassel/Hicksville Groundwater Contamination Superfund Site (the "Site").

We represent Charles Pufahl, as a former partner of Northern State Realty Co. ("NSR"), Adchem Corp. ("Adchem"), and Lincoln Processing Corp., ("Lincoln"), each of which EPA recently named in letters as PRPs at the Site. Our clients have been, for some time, defendants in a private cost-recovery action captioned Next Millennium Realty, LLC v. Adchem Corp. et al., 03-cv-5985 (E.D.N.Y.) ("Next Millennium").

EPA's most recent letters were generated when Assistant Regional Counsel Sharon Kivowitz met with counsel for our Next Millennium adversary, and received our adversary's theories of its district court litigation and its motion papers. Counsel for our adversary did not offer the EPA the extensive motion papers generated by our clients, and apparently they were never asked for. In any event, we never were given any opportunity to appear before EPA to correct the information received from our adversary. Upon receiving letters dated July 22, 2014 from Ms. Kivowitz, we sought to have the very specific incorrect allegations in these letters corrected and for EPA to revisit the more general allegation against Adchem, due to the irrefutable fact that Adchem never used any contaminant of concern, never owned or leased any suspect site, and never conducted any manufacturing activities at any such site.

While we understand that EPA has a practice of issuing general notice letters to a large array of potentially liable parties, the letters to NSR/Charles Pufahl and Lincoln contain specific allegations which, to be charitable, are supported solely by an adversary's view of the facts and

legal theories. On the other hand, the General Notice Letter to Adchem can only make sense if EPA is crediting a veil-piercing argument that has been soundly rejected by the Second Circuit.

Nevertheless, your staff has denied our request that EPA withdraw or modify the letters, which denial not only imposes unwarranted financial and emotional burdens for our clients (particularly Charles Pufahl, an 87-year old retiree living in Vermont), but also is hindering EPA's settlement efforts with legitimate responsible parties, whose reluctance to settle is due at least in part because they wrongly believe – based on the PRP letters – that our clients should contribute. Given these circumstances, we request that you direct your staff to withdraw the letters without prejudice to renew them, or revise them to accurately reflect the applicable legal theories and the facts developed after extensive district court discovery.

Background

In two years of active discovery in Next Millennium, the parties exchanged over 100,000 pages and a dozen expert reports, and took 20 depositions. The facts adduced during the discovery period, which is now closed, show that there is no basis to hold Adchem or NSR liable and that Lincoln's release of PCE, if any, was *de minimis*. Whether there is any legal basis for PRP liability for either Adchem or NSR is the subject of two summary judgment motions now *sub judice*.

We set forth the basis of our request that EPA withdraw its PRP allegation against Adchem and NSR/Mr. Pufahl in an August 4, 2014 letter to Assistant Regional Counsel Sharon Kivowitz. (A copy of that letter is attached, and the attachments to that letter – which includes our summary judgment briefing – are included on the enclosed CD.) My colleagues Dan Chorost and Edward Roggenkamp then met with her on August 7 to discuss our position. During that meeting, Ms. Kivowitz acknowledged that EPA formulated its position and issued its letters against Lincoln and NSR based on *ex parte* discussions with our Next Millennium adversary, and acknowledged that neither Lincoln nor NSR had an opportunity to provide contrary information or otherwise be heard. Ms. Kivowitz also indicated that she had not reviewed all of the summary judgment briefing from Next Millennium.

At the very least, this conduct calls into question both the rationality of EPA's decision to issue the PRP letters, and the agency's objectiveness. In addition to the blatant factual distortions provided to EPA on an *ex parte* basis by our adversary (as discussed below), EPA's response to our FOIA request also shows that EPA's determination to issue the NSR and Lincoln PRP letters involved our adversary's gross distortion of the extent to which insurance coverage applied. Mr. Maldonado told the agency that "[t]here are multiple policies in play" and that our clients' "carriers are tendering a defense." In fact, all carriers have denied coverage.

Ms. Kivowitz's decision not to withdraw or modify the letters has been compounded by her statement that EPA would wait to see how the court rules on our pending motions for summary judgment – a tacit admission that the agency does not have an opinion about the

viability of its allegations. It is unacceptable for EPA to issue specific allegations against our clients and then simply wait for a ruling on the summary judgment motions in our private-party litigation. EPA should withdraw or amend its allegations now because, as discussed below, there is no basis for EPA's PRP claims against NSR and Adchem, and the facts show that Lincoln, a corporation that dissolved in the late 1970s, had only limited potential to have released PCE and has no remaining assets. Meanwhile, the unfounded specific allegations that persist in EPA's letters are injurious to our clients, who are incurring legal bills and are prejudiced insofar as other PRPs construe EPA's PRP letters as "findings."

While we respectfully request that you review our August 4 letter in its entirety, below is a summary of the arguments set forth therein.

NSR / Charles Pufahl

In July 2014, EPA notified Charles Pufahl – a 87-year old retiree living in Vermont – that he is "liable as an owner of 89 Frost Street" (emphasis supplied) as the last surviving general partner of Northern State Realty Co. ("NSR"), a former tenant of our adversary in Next Millennium, which is the past and present actual owner. The EPA letter goes so far as to state that the basis of this alleged liability is that NSR "had indicia of ownership/control under its lease purchase agreement for the property…[and] sublet the facility to entities which were responsible for release of hazardous substances."

Again, Ms. Kivowitz acknowledged that EPA did not contact Charles Pufahl or this firm before issuing the PRP letter, or otherwise afford us the opportunity to discuss these allegations or provide information with respect to them. Instead, the agency allowed our Next Millennium adversary to provide (incomplete) background and (distorted) inferences *ex parte*, which is both unfair and contrary to EPA practice. Moreover, this allegation is either blatantly deficient or disingenuous, because as recognized by the Second Circuit's Commander Oil decision – which gave rise to the theory alleged against Mr. Pufahl – every tenant has indicia of ownership and control under a lease. Far more is required to convert a tenant into a CERCLA owner: to wit, facts showing that the tenant possessed such an extraordinary bundle of rights that it assumed ownership-like control, which facts are so rare that no such liability has ever been established in the Second Circuit. Our August 4 letter, along with the accompanying briefing, demonstrates that the 1966 lease between landlord Jerry Spiegel and NSR's predecessor does not give sufficient indicia of ownership to the tenant therein to make it a *de facto* owner, as is necessary for Commander Oil owner liability. Therefore, Mr. Pufahl cannot be a PRP due to his status as a former NSR general partner.

EPA should withdraw its allegation that Mr. Pufahl has CERCLA liability as an owner, which allegation is based entirely on what would be an unprecedented Commander Oil theory. If EPA really believes that the underlying facts are such that it can make the case that Mr. Pufahl should be deemed an owner given his status as a general partner in a former tenant, then the PRP

letter should set forth the basis of that claim and make plain that the agency made that determination without communicating with Mr. Pufahl or counsel. Otherwise, EPA should withdraw the PRP letter and give Mr. Pufahl the peace of mind that he deserves.

Adchem

In July 2013, EPA notified Adchem of its potential liability "as an owner or operator" of a facility at the Site at the time of disposal of hazardous substances. Both of those vague allegations are false. As we reminded EPA in our August 4 letter, Adchem's 104(e) responses – as well as the extensive discovery that has taken place in the Next Millennium case – confirm that Adchem never owned property in the New Cassel Industrial Area ("NCIA"), never leased or operated at 89 Frost, and never used PCE or any other chlorinated solvents – the constituents of concern in the NCIA – in any of its operations. These facts have never been contested, and in fact the Next Millennium plaintiffs did not contest them in their response to our clients' summary judgment motion.

Thus, the only possible basis for PRP status for Adchem is to pierce the corporate veil, as per Next Millennium's "single enterprise" theory.[1] EPA's letter naming Adchem as a PRP does not allege that Adchem was an alter ego or articulate any other valid legal theory for liability to attach to Adchem. To reach Adchem via veil-piercing, EPA would have to prove that (i) Adchem improperly dominated and controlled another entity that released PCE at 89 Frost; and that (ii) the domination caused the PCE release at 89 Frost.[2] The first prong is supported only by our adversary's vague allegations of improper connections between the Pufahl family and their closely-held entities, which allegations defy or are contradicted by overwhelming evidence to the contrary. But more importantly, even after years of discovery, our adversary offers no evidence supporting the causation prong of the veil-piercing inquiry; we are certain that EPA can do no better. In light of these circumstances, EPA cannot and should not maintain the PRP allegation against Adchem. If EPA continues to maintain the allegation, the PRP letter should be revised to indicate that Adchem could only be liable under a veil-piercing or single-enterprise theory.[3]

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[1] Our attached August 4 letter and the supporting motion papers set forth the relevant facts and law, and we expect that Magistrate Lindsay will grant summary judgment in Adchem's favor.

[2] New York State Electric and Gas Corp. v. FirstEnergy Corp., 2014 WL 4453223 at *11, ___ F.3d ___ (2d. Cir. Sept. 11, 2014); Bedford Affiliates v. Sills, 156 F.3d 416, 431-32 (2d Cir. 1998), *overruled in part on other grounds by* W.R. Grace & Co.-Conn. v. Zotos Int'l, Inc., 559 F.3d 85, 89-90 (2d Cir. 2009).

[3] EPA's FOIA response shows that the Next Millennium plaintiffs provided EPA with a June 18, 2014 legal memorandum suggesting that Adchem might be liable on a joint venture or successorship theory. The Next Millennium plaintiffs did not inform EPA that on June 17, 2014, they filed summary judgment briefs that did not raise either theory. It would be highly inappropriate for EPA to rely on legal theories propounded by parties that abandoned those theories – a tacit admission that they are baseless – by failing to raise them in ongoing litigation.

Lincoln

In July 2014, EPA notified this firm that Lincoln – a corporation that dissolved decades ago and has no remaining assets – bears potential PRP liability as an operator at 89 Frost. That letter then goes further, alleging that "[d]uring its tenancy at the facility, Lincoln [] utilized PCE and TCE in its processes which were released at the facility."

Given the facts developed in the district court proceeding, the agency's specific allegation regarding PCE and TCE use and release by Lincoln is egregious and should be withdrawn. As an initial matter, all of the evidence adduced in Next Millennium demonstrates that Lincoln never used TCE. Moreover, there is extensive evidence and expert opinion showing that Lincoln used no PCE whatsoever during its manufacturing process. While there is a factual dispute as to a separate quality-control check involved Lincoln installing a small dry cleaning machine at 89 Frost Street, several witnesses testified that Lincoln had no such machine, and contemporaneous equipment lists do not show that any such machine existed. Even if the small machine as described by two former employees did exist, expert testimony indicates that any PCE emissions would have been to the air only; indeed, no PCE was found in the ground locations where any such machine would have drained. We expect to prove at trial that Lincoln is not a PRP, but even if it were, any release would have been *de minimis*.

EPA therefore should withdraw or modify its letter against Lincoln. At a minimum, EPA should retract the letter's allegation that Lincoln "utilized PCE and TCE in its processes which were released" at 89 Frost Street, which is entirely unsupported by the evidence, and remove the specific allegation that Lincoln used PCE, given that this is a heavily-contested issue and the weight of the evidence shows that PCE was never used in Lincoln's process and likely was not even used in a quality-control step. EPA also should agree to withhold further action against Lincoln until Next Millennium is resolved.

We submit that it is an abuse of EPA's discretion to refuse to correct its accusatory letters against Adchem and Charles Pufahl. EPA tacitly admits its infirm factual footing by suggesting that it will await a ruling on our motions by Magistrate Lindsay, and has refused to withdraw its PRP letter against Adchem or Charles Pufahl because our motions were opposed. Under the circumstances summarized above, that is not an appropriate basis for the federal government to keep an elderly retiree or a corporation with no connection to the site "on the hook" as named PRPs, with all of the concomitant financial and emotional burdens that go with such status. Among other prejudice, our clients are starting the allocation discussions among other PRPs with a handicap of the above EPA "findings," which otherwise have no basis. The unwarranted allegations in the letters also provide other PRPs – including our Next Millennium adversaries, who together with their predecessors have owned and profited from 89 Frost Street for over fifty years – with fodder upon which to make their own "findings" relating to our clients. Thus, so long as our clients decline to contribute to a problem for which they bear no legal responsibility,

EPA's refusal to withdraw the PRP letters discourages the legitimate responsible parties from stepping forward and settling their liability.

We acknowledge, of course, that should EPA withdraw or correct its PRP notices, the agency would not be precluded issuing new or revised PRP letters against our clients if Magistrate Lindsay's rulings or other factors suggest that such allegations would be justified and appropriate.

We would like to discuss this matter with you at your earliest convenience, and thank you for your consideration.

Respectfully,

Daniel Riesel

Encl.

Cc: Sharon Kivowitz, Esq. (EPA)

Attachment: August 4, 2014 letter

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August 4, 2014

VIA HAND DELIVERY & EMAIL
Sharon Kivowitz, Esq.
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Dear Ms. Kivowitz:

We represent Adchem Corp. ("Adchem"), Lincoln Processing Corp., ("Lincoln"), and Charles Pufahl, as a former general partner of Northern State Realty Co. ("NSR"). As discussed, in anticipation of our meeting on August 7th, this letter provides the basis of our position that EPA should withdraw its PRP allegation against Adchem and Mr. Charles Pufahl. We also describe the limited potential of Lincoln – a corporation that dissolved in the late 1970s and has no remaining assets – to have released PCE.

In July 2013, EPA notified Adchem of its potential liability "as an owner or operator" of an NCIA facility at the time of disposal of hazardous substances. Adchem provided 104(e) responses demonstrating that it never owned property in the New Castle Industrial Area ("NCIA"), never operated at 89 Frost, and never used chlorinated solvents – the constituents of concern in the NCIA – in any of its operations. Last week, EPA notified Charles Pufahl of his potential PRP liability "as an owner of 89 Frost Street" because he was "a general partner of [NSR]," which entity allegedly had "indicia of ownership/control" of 89 Frost as a lessee. EPA made no 104(e) request to Mr. Pufahl and did not contact him or our firm prior to notifying him of his PRP status. Similarly, last week EPA notified Lincoln, via our firm, of its potential liability as an operator due to its alleged use of PCE and TCE at 89 Frost, also without any prior contact, much less an opportunity to discuss the ex parte importuning of our adversary's counsel.

As you know, Adchem, Lincoln, and NSR are defendants in Next Millennium Realty, LLC v. Adchem Corp. et al., 03-cv-5985 (E.D.N.Y.) ("Next Millennium"). In two years of discovery, the parties exchanged over 100,000 pages and a dozen expert reports, and took 20 depositions. Discovery closed in February 2014, and the facts show that there is no basis to hold Adchem or NSR liable and that Lincoln's release of PCE, if any, was *de minimis*. Whether there is any legal basis for PRP liability for either Adchem or NSR is the subject of two summary judgment motions now *sub judice*. Should EPA move forward against our clients before the motions are resolved, Next Millennium and the other Spiegel

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interests – which have owned 89 Frost since 1958 and receive millions of dollars in annual income from it – will have no incentive to meaningfully participate in any settlement discussions.

EPA's allegations against our clients do not reference these pending motions, the extensive discovery material, or Adchem's 104(e) response, but instead closely track Next Millennium's 104(e) response from late 2013. Most of Next Millennium's 104(e) allegations are made "upon information and belief," which might have been appropriate in an initial complaint but are far too little now, after exhaustive discovery, to sustain EPA's allegations. To the extent any of Next Millennium's 104(e) allegations were based upon evidence, that evidence was misconstrued by Next Millennium's counsel. Moreover, Next Millennium's counsel failed to provide evidence available to him that contradicted these allegations, such as deposition testimony by the witnesses whose affidavits he submitted to EPA that recants or clarifies those affidavits. Next Millennium's counsel also failed to provide EPA with contact information for these witnesses, despite having subpoenaed them and participated in their depositions at the time of his response.

Adchem Cannot Be A PRP Because There Is No Evidence To Support Veil Piercing

As discussed in great detail in Adchem's 104(e) response and its second motion for summary judgment, enclosed herewith, Adchem never owned any NCIA site. Adchem's NCIA operations occurred at 625 Main Street and 85 New York Avenue, neither of which are listed on New York's Registry or mentioned in either NYSDEC's Record of Decision for OU3 or EPA's Record of Decision for OU1 at the Site; indeed, no chlorinated solvent source has been found at either location. Adchem's operations were incompatible with chlorinated solvents, as its process ovens would have transformed chlorinated solvents into corrosive hydrochloric acid and deadly phosgene gas.

Adchem never leased or operated at 89 Frost. In fact, Adchem's only connections to 89 Frost are: (i) Adchem's original officers and directors – Joseph, Charles and Herman Pufahl, who were also officers of Lincoln during its time at 89 Frost – had offices there from approximately 1966 to 1973; (ii) Adchem occasionally used 89 Frost's conference room for meetings; (iii) in Adchem's early years, it relied on Lincoln personnel at 89 Frost to perform certain administrative tasks; and (iv) Adchem sold water-based adhesive to Lincoln for use in Lincoln's fabric bonding operations. None of these activities involved the use or release of hazardous substances; in fact, Next Millennium did not contest Adchem's lack of direct CERCLA liability in the recent summary judgment briefing.

Given these uncontested facts, the only possible basis for PRP status for Adchem is to pierce the corporate veil, as per Next Millennium's "single enterprise" theory.[1] However, New York law "disfavors disregard of the corporate form,"[2] and therefore "affiliated corporations are, as a rule, treated separately and independently."[3] To reach Adchem via veil-piercing, EPA would have to prove that (i) Adchem improperly dominated and controlled another entity that released PCE at 89 Frost; and that (ii) the

[1] See U.S. v. Bestfoods, 524 U.S. 51, 63-64 (1998).
[2] Cobalt Ptrs., L.P. v. GSC Capital Corp., 97 A.D.3d 35, 40 (1st Dep't 2012).
[3] Sheridan Broadcasting Corp. v. Small, 798 N.Y.S.2d 45, 46 (1st Dep't 2005).

domination caused the PCE release at 89 Frost.[4] Even after years of discovery, Next Millennium was unable to offer any evidence supporting the causation prong of the veil-piercing inquiry.

Moreover, the facts admitted by Next Millennium's counsel during the Rule 56.1 process in Next Millennium show that there was no improper domination and control by Adchem or by the Pufahls more generally. The Pufahls were owners and directors of several entities, each of which engaged in different businesses selling different products to different customers; each entity took care to observe the corporate formalities, as evidenced by hundreds of pages of surviving documentation from the relevant time period, including board meeting minutes, incorporation papers, and separate books and records. The entities were financially separate and treated as independent profit centers, with separate bank accounts, financials, tax identification numbers and tax filings. The entities also dealt with each other at arm's length and reimbursed each other for shared expenses. For example, Adchem marked up the cost of all adhesive it sold to Lincoln so as to exceed Adchem's labor, materials, and overhead costs. Lincoln obtained adhesive quotes from Adchem's competitors to ensure that Adchem offered fair market pricing. Similarly, Adchem and Lincoln subleased their operating locations from Pufahl Realty Corp. (later known as Northern State Realty Corp. and NSR), and the leasing entity profited on those subleases.

In the face of this evidence against veil-piercing, Next Millennium offers only vague allegations of improper connections between the Pufahls and their closely-held entities. Many of those allegations distort or ignore the voluminous contradictory evidence.

Charles Pufahl Cannot Be A PRP Because NSR Was A Typical Lessee, Not An Owner

EPA alleges that Charles Pufahl – a retiree in his 80s living in Vermont –is liable as an owner of 89 Frost as the last surviving general partner of NSR, because NSR "had indicia of ownership/control under its lease purchase agreement for the property...[and] sublet the facility to entities which were responsible for release of hazardous substances."

In 1973, NSR was assigned the 1966 lease ("Lease") between landlord Jerry Spiegel and tenant Pufahl Realty Corp., a copy of which is included. As discussed in our summary judgment briefing, the Lease does not give sufficient indicia of ownership to the tenant therein to make it a *de facto* owner, as is necessary for owner liability under Commander Oil v. Barlo.[5] The Commander Oil plaintiff sought to hold a lessee/sublessor, Barlo, liable as a CERCLA owner based on its control of the contaminated site and its sublease to the party that had released hazardous substances. The Court of Appeals rejected the argument that site control was a basis for owner liability, and held that Barlo's lease – which shares many terms with the Lease at issue here – did not give rise to owner liability. 215 F.3d at 328-29.

The fundamental holding of Commander Oil is that the typical lessee is not a CERCLA owner. Commander Oil gives the following examples of when a tenant could hold such a priority of rights and claims that it becomes the *de facto* owner, but none of them apply here: the "proverbial 99-year lease"; a "sale-leaseback arrangement[]...[where] the lessee actually retains most rights of ownership with respect

[4] Bedford Affiliates v. Sills, 156 F.3d 416, 431-32 (2d Cir. 1998), *overruled on other grounds as recognized in* W.R. Grace & Co.-Conn. v. Zotos Int'l, 559 F.3d 85, 90 (2d Cir. 2009).
[5] 215 F.3d 321 (2d Cir. 2000).

to the new record owner"; an "extremely long term lease[]...[where] the lessee retains so many of the indicia of ownership that he is the *de facto* owner"; or where "a lessee/sublessor impermissibly exploit[s]...more rights than he originally leased, effectively expropriating...the right to benefit from activity on the property." 215 F.3d at 329. 330-31. As our experts opined, none of these instances come close to approximating the typical commercial lease between Spiegel and NSR.

Commander Oil also lays out five non-exclusive factors that "could be important" in the *de facto* owner inquiry. The first is whether the "lease is for an extensive term and admits of no rights in the owner/lessor to determine how the property is used." NSR's lease was for twenty years, a typical term for single-tenant industrial leases where the cost of moving heavy equipment makes short-term leases uneconomical. Our review of cases shows that no lease of less than 45 years has ever given rise to owner liability. The only possible exception is Pateley Associates v. Pitney Bowes,[6] which involved a sale-leaseback transaction and is therefore inapposite. Moreover, while the initial lease in Pateley was for a 25-year term, it also contained three 10-year renewal terms, extending the full term of the lease to 55 years.

NSR's lease also gave the owner extensive rights to control the tenant's use of 89 Frost. The landlord restricted NSR's use to manufacturing, precluding retail or commercial use; prohibited any use that would increase fire insurance rates; prohibited alterations or signage on the property without landlord approval; required the tenant to keep the property in good condition and return it without damage; and reserved to the landlord the right to enter and inspect the property and perform any of the tenant's obligations at the tenant's expense. Moreover, the landlord was required to perform all repairs for the first two years of the lease and all structural repairs thereafter, except those repairs caused by the tenant. Almost all of these restrictions were present in Barlo's lease and were cited by Commander Oil as weighing against owner liability for Barlo. 215 F.3d at 331-32.

The second Commander Oil factor is whether the lease "cannot be terminated by the owner before it expires by its terms." Spiegel retained several rights to terminate the Lease before it expired – for example, upon default in the payment of rent, or upon destruction of the premises by fire. Spiegel in fact did terminate the Lease in 1976 following a fire that destroyed 89 Frost, rendering Next Millennium's statement in its 104(e) response that the Lease did not "grant[the] Landlord early termination rights" a serious distortion of the facts. Moreover, the right to terminate or continue the lease following destruction of the premises is usually a right retained by the tenant under N.Y. R.P.L. 227; the Lease therefore granted *more* termination rights to the landlord than would be typical.

The third factor is whether the lessee "has the right to sublet all or some of the property without notifying the owner." While NSR could sublet without notifying Spiegel, New York law affords this right to all tenants unless the lease specifies otherwise; a right that is common to all tenants cannot be indicia of ownership without contradicting Commander Oil's statement that the typical lessee is not an owner.

The fourth factor involves whether the lessee "is responsible for payment of all taxes, assessments, insurance, and operation and maintenance costs." NSR held a typical "triple-net lease" requiring that it pay insurance, assessments, operation and maintenance costs, and some (but not all) taxes, but triple-net leases are the most common type of commercial lease. If holding a triple-net lease gives rise to CERCLA

[6] 704 F.Supp.2d 140 (D. Conn. 2010).

liability, then nearly all commercial tenants are CERCLA owners; again, this is contrary to Commander Oil. Even with the triple-net lease, Spiegel retained significant ownership interests: for example, Spiegel was required to pay transfer and inheritance taxes on 89 Frost, which taxes are typically paid by the owner of property; and Spiegel retained the right to any insurance or condemnation proceeds and the right to transfer the property, both of which show that he maintained his ownership according to controlling precedent.[7] Finally, the fifth factor involves whether the "lessee is responsible for making all structural and other repairs." 215 F.3d at 330-31. Spiegel was required by ¶4 of the Lease addendum to make "all structural repairs," which indicates that the tenant was not the building's *de facto* owner.

Several other factors indicate that NSR Co. never owned 89 Frost, as further discussed in our summary judgment motion on this point, which we enclose. Most pertinently, the unexercised purchase option contained in ¶65 – which is not "unconditional" as Next Millennium claims, but is expressly conditioned on full and complete performance of all Lease terms by the tenant and exercise of the option in accordance with its terms – cannot give rise to ownership, since under New York law a purchase option gives no interest in the property until it is exercised[8] and the Lease was terminated by the landlord before the option came into existence. As a matter of law, NSR was not a *de facto* owner of 89 Frost, and Mr. Pufahl cannot be a PRP due to his status as a NSR general partner.

PCE Contribution By Lincoln, If Any, Was At Most De Minimis

Extensive testimony on Lincoln's fabric bonding shows that Lincoln did not use chlorinated solvents in its manufacturing process; and Next Millennium distorts the facts when it argues to the contrary. For example, Next Millennium has submitted witness affidavits suggesting that "a strong solvent" was used to clean Lincoln's machinery; however, at deposition, those witnesses testified that primarily water and scrub brushes or rags were used to clean Lincoln's machinery, and that occasionally methyl ethyl ketone – which is not a contaminant of concern at the Site – was used when water and scrubbing were insufficient. Next Millennium did not provide this testimony with its 104(e) response, despite having it at the time.

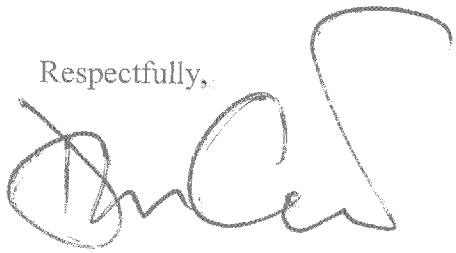
In addition to Charles Pufahl's unequivocal statement that PCE was not used and in fact was inimical to the manufacturing process, we submitted extensive expert testimony reinforcing this fact. There is a factual dispute as to whether Lincoln installed a small dry cleaning machine at 89 Frost for quality control, which precludes Lincoln from seeking summary judgment on its operator liability. Several witnesses testified that Lincoln had no such machine, and contemporaneous depreciation schedules and machinery lists show no indication that any such machine existed. Even if the small, batch-type dry cleaning machine described by two former Lincoln employees existed, undisputed expert testimony in Next Millennium states that any PCE emissions from this machine would have been to the air; this is further supported by the fact that no PCE has been found in the area of 89 Frost where the employees testified the machine was located, or the drainage features that would have received sanitary

[7] Palazzolo v. Rhode Island, 533 U.S. 606, 628 (2001) (right to condemnation award is held by "the owner of the property at the time of the taking"); Colleges of the Senecas v. City of Geneva, 94 N.Y.2d 713, 717-18 (2000) (Wesley, J.) ("incidents of ownership" in lease include "right to determine whether or not to rebuild", right to insurance proceeds, and right to possession at termination of lease term).

[8] JNA Realty v. Cross Bay Chelsea, 42 N.Y. 392, 397-98 (1977).

discharge from that part of the building. We therefore expect to prove at trial that Lincoln is not a PRP. Even if Lincoln were a PRP, the evidence shows that any releases that may have occurred during Lincoln's occupancy of 89 Frost were *de minimis*, and Lincoln is dissolved and has no assets with which to satisfy a judgment or participate in a settlement. To the extent EPA still intends to proceed against Lincoln given these circumstances, we request that you withhold further action until after Next Millennium is resolved.

Respectfully,



Dan Chorost

Enclosures:

1. Defendants' May 20, 2014 Motion for Partial Summary Judgment, Next Millennium Realty, LLC v. Adchem Corp., et al., 03-cv-5985 (E.D.N.Y.)
2. Documents relating to Adchem operations: Certification of Use of Property Located at 89 Frost Street (Oct. 26, 2000); Adchem Corp. Application for Part 360 Permit (June 16, 1981)
3. Defendants' January 28, 2014 Motion for Partial Summary Judgment, Next Millennium Realty, LLC v. Adchem Corp., et al., 03-cv-5985 (E.D.N.Y.) (incl. April 1966 Lease for 89 Frost Street)
4. Excerpts of Deposition Testimony, Next Millennium Realty, LLC v. Adchem Corp., et al., 03-cv-5985 (E.D.N.Y.)
    a. Obadiah Goodman
    b. Lloyd Leary
    c. Robert Blanks
    d. Louis Falletta
    e. Charles Pufahl
    f. Dr. B. Tod Delaney
5. Lincoln Machinery Documentation
6. Expert Witness Reports, Next Millennium Realty, LLC v. Adchem Corp., et al., 03-cv-5985 (E.D.N.Y.)
    a. Dr. B. Tod Delaney
    b. Thomas Godonis
    c. Dr. Martin Bide
    d. Jack O'Connor
    e. David Tesler

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